



Automotive Industry Group Regulatory Update

June 2017

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Introduction

Welcome to the HWL Ebsworth Automotive Industry Group - Regulatory Update

HWL Ebsworth seeks to keep you updated with the changing automotive industry environment across new legislation, developing policy and pertinent case law developments.

Through our Regulatory Updates we provide essential information for those wanting to stay abreast of the challenges and issues facing the automotive industry, especially those affecting dealers.

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Headlines

- Harper Competition Review Bill and Misuse of Market Power Bill (see item 1.1)
- ASIC prohibition of flex commissions (see item 2.1)
- ACCC denies insurers cap on insurance commissions (see item 3.2)
- Australian Consumer Law Review recommends significant changes (see item 3.4)
- Productivity Commission delivers enforcement & reform report as part of Australian Consumer Law review (see item 3.5)

Case Law Headlines

- Guarantees as to acceptable quality (see item 4.2)
- Dealer Sales Targets in franchise agreements (see item 4.4)

1 Legislation Update

1.1 New and current legislation

Harper Competition Review Bill

The Competition and Consumer Amendment (Competition Policy Review) Bill 2017 which amends the Competition and Consumer Act 2010 was introduced to Federal Parliament on 30 March 2017. Schedule 2 of the Harper Review Bill amplifies the law on cartel conduct and targets anti-competitive conduct.

Schedule 7 of the Harper Review Bill changes the existing law only to prohibit third line forcing where it has the purpose, effect or likely effect of substantially lessening competition. This is in contrast to the current law, where third line forcing is prohibited on a per se basis, that is, it is prohibited irrespective of its purpose, effect or likely effect. In a franchising context, the proposed legislative change will make it easier for franchisers to require franchisees to only deal in one brand. Under the proposed legislative change, it will be possible for motor vehicle distributors to require dealers to only have one brand, as such a requirement is not likely to have the purpose, effect or likely effect of substantially lessening competition as there is a great deal of competition in the wholesale of passenger motor vehicles in Australia.

In broad terms, the Competition Review Bill deals with cartel and other restrictive trade practices and does not address small business issues including the failure of unconscionable conduct provisions to assist dealers from exploitative conduct by distributors. While the Misuse of Market Power Bill does strength Section 46 to prohibit companies with a substantial degree of market power from engaging in conduct that substantially lessens competition, the new provision is unlikely to have application in a highly competitive market such as the motor vehicle wholesale and retail markets.

The Competition Policy Review Bill can be found here -

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r585
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Misuse of Market Power Bill 2017

In a related development based on the Harper Review of competition law, the Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 passed the House of Representatives on 28 March 2017 and it was introduced into the Senate the following day. The Misuse of Market Power Bill is intended to assist small businesses by making it easier for small businesses to demonstrate that a business with substantial market power has abused that power. The proposed new law will prohibit a business with a substantial market power from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in markets in which the business directly or indirectly participates. This is in contrast to the current Section 46 which requires a party to demonstrate that a business that has a substantial market power has the necessary predatory purpose.

The Misuse of Market Power Bill can be found here -

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r578
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2 Proposed Legislation

2.1 ASIC Prohibition of Flex Commissions

On 3 March 2017, ASIC announced that it would prohibit flex commissions. Flex commissions are an arrangement whereby the car dealer or the dealer's finance manager (not the lender) sets the interest rate payable by the consumer. The car dealer can therefore earn a higher commission by setting a higher interest rate.

ASIC's announcement follows a review of commission arrangements in the car finance market over a number of years, the release of two discussion papers in December 2015 and 3 June 2016 and consultation with stakeholders, from individual lenders, car dealers and industry bodies.

Whilst, ASIC's proposal was opposed by stakeholders in the motor vehicles industry (given the industry relies on revenue from consumer finance to supplement narrow profit margins on sales in an increasingly competitive market), ASIC's proposal incorporates key industry recommendations and has been welcomed by the industry.

ASIC proposes to use its statutory power to modify the provisions of the National Credit Act to prohibit the use of flex commissions so that the amount paid in commissions is not linked to the interest rate and the lender is responsible for determining the interest rate that applies to a particular loan based on the credit worthiness of a customer. Dealers will not be able to increase the interest rate and increase the commission as a result.

ASIC however has recognised the need for flexibility and dealers will be allowed to reduce the interest rate set by the financier by up to 2% and reduce commissions accordingly. This will benefit consumers through a lower costs of credit.

ASIC will also allow origination fees, provided they are set by the financier and are reasonable.

There is a proposed transition period of 18 months under the new arrangements.

ASIC says that under this proposal, financiers will continue to generate the same revenue as before and should have the same availability to pay similar level of commissions to dealers.

AP Eagers has welcomed ASIC's proposal stating:

"We believe ASIC's proposal will establish a level playing field for consumers by prohibiting all car dealerships and finance brokers from increasing interest rates payable by customers above a base rate set by financiers and participating in any benefits from the increase."

"We believe ASIC's decision will provide surety for financiers to continue offering market competitive rates, while allowing dealers to be reasonably compensated for managing customer outcomes at the point of sale. Importantly, we will retain the ability to make reasonable adjustments to consumer rates at the point of sale in order to meet market, consumer and transaction requirements."

ASIC released a consultation paper seeking feedback on a draft legislative instrument to prohibit the use of flex commission arrangements. Submissions were due on 27 March 2017.

AADA Submission to ASIC

In March this year the Australian Automotive Dealer Association Ltd (AADA) provided a submission to ASIC in respect of its decision to ban flex commissions. AADA stated that any regulation of flex commissions should apply consistently across all suppliers of goods and services and not just the car finance industry and it would like to work with ASIC to ensure a smooth implementation of any restrictions on flex commissions, including by facilitating the development of useful guidance for industry.

In its submission AADA stated:

- As currently proposed, the ban would not only prevent dealers from proposing rates higher than a base rate, it would also prohibit dealers from proposing rates which are discounted below the base rate by a margin of, perhaps, a few percentage points. The extent to which dealers can subsidise interest discounts will be affected such that interest subvention programs by dealers would be severely disrupted and place dealers at a competitive disadvantage compared with other sectors of the economy operating in a similar fashion.
- If a margin below a base rate was permitted, the margin should be scalable to reflect market rates.

<https://www.asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-279-flex-commission-arrangements-in-the-car-finance-industry/>

Relevance to dealers

The prohibition of flex commissions was initially thought to have a significant financial impact on motor vehicle industry corporations by eroding profits. However following consultation with target stakeholders ASIC's proposal looks to benefit consumers by removing incentives that increase the interest rates they are charged without reducing the level of commissions able to be earned by dealers. We will keep you informed as developments occur in relation to the legislative instrument used to prohibit flex commissions.

3 Policy Update

3.1 ASIC's insurance reports affecting car industry

In February 2016, ASIC released a series of reports investigating the purchase of add-on insurance products by consumers when purchasing a motor vehicle through a dealership, such as life insurance ('car yard life insurance') ASIC's report 'Buying add on insurance in car yards: Why it can be hard to say no' (REP 470) found that most consumers are not prepared and have no prior knowledge of add-on insurance, are often exhausted by the purchasing process, feel pressured by the sales staff, do not remember what products they have purchased, how much they paid for the products or what the products covered them for.

ASIC followed REP 470 with 'The sale of life insurance through car dealers: Taking consumers for a ride' (REP 471) and suggested that car yard life insurance is ultimately poor value for money as it can be substantially more expensive but provide less cover than other forms of life insurance, and can be sold when it is not necessary e.g. sold to young people with no dependents or to consumers who do not want the product.

The next report, 'A market that is failing consumers: The sale of add on insurance through car dealers' (REP 492), reviewed specific insurance products offered for sale through new car dealers as an add-on to a new car purchase. In addition to supporting the findings of REP 471, REP 492 highlighted the nature of these insurance products to be packaged into consumer's car loans which can substantially increase the cost of the product by increasing the loan amount and interest paid.

ASIC's follow up actions following these reviews include closely monitoring practices of individual insurers who sell on add-on insurance products through car dealers and working closely with the industry to ensure that significantly better outcomes for consumers are achieved.

- ASIC has stated that insurers who fail to address our findings will be subject to further regulatory action , which may include
 - taking targeted enforcement action against insurers or their authorised representatives selling the products;
 - pursuing remediation for consumers who have been missold add-on insurance policies;
 - publically naming individual insurers who fail to deliver significantly improved outcomes for consumers; and
 - exploring law reform options to ensure fair and appropriate outcomes for consumers.

Additionally, the Insurance Council of Australia addressed these concerns by launching a review of the General Insurance Code of practice, which commits insurers to mandatory standards of service beyond their existing statutory obligations. Seven out of fifteen sections of the Code will be reviewed, including financial hardship, complaints and disputes, and monitoring, enforcement and sanctions.

The ASIC Reports can be found here:

REP 470 - <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-470-buying-add-on-insurance-in-car-yards-why-it-can-be-hard-to-say-no/>

REP 471 - <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-471-the-sale-of-life-insurance-through-car-dealers-taking-consumers-for-a-ride/>

REP 492 - <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-492-a-market-that-is-failing-consumers-the-sale-of-add-on-insurance-through-car-dealers/>

3.2 ACCC denies insurers cap on insurance commissions

Following ASIC's report referred to in item 3.2 above relating to buying add-on insurance in car yards, a number of insurers, who together account for the bulk of add on insurance products sold through motor vehicle dealerships, have made an authorisation application to the ACCC to implement a proposal that will limit the commissions that insurers pay to dealers to 20% of premiums. The insurers propose that they would agree to be bound by a voluntary code of conduct where insurers sell add-on insurance products through the motor vehicle dealership channel. According to the authorisation application the restriction on commissions would include not only payments described as commissions but also payments and benefits that may be described as marketing or advertising subsidies on management fees but in reality are connected with the volume or sales of add-on insurance products.

In its submission to the ACCC, AADA representing over 1500 new car dealers in Australia stated that the insurer's proposal does not address ASIC's concerns, will not result in any significant public benefit and gives rise to unintended consequences. Importantly, AADA stated that the insurer's proposal would only capture add-on insurance sold through dealerships and not all insurance channels through which add-on insurance is distributed.

In the absence of authorisation by the ACCC the proposed conduct by the insurers would likely run the risk of contravening the cartel conduct and other prohibitions against exclusive dealing in breach of the Competition and Consumer Act.

On 17 February 2017, the ACCC issued a draft determination proposing to deny authorisation to 16 insurance companies to jointly impose a cap of 20 percent on commissions paid to motor vehicle dealers who sell their add-on insurance products.

Following the release of the draft determination the ACCC offered to extend the timeframe for consideration of the proposal to allow the insurers extra time to respond to the ACCC's concerns. The insurers did not provide a submission in response to the draft determination.

On 9 March 2017, the ACCC issued a final determination denying authorisation to 16 insurance companies to agree to a cap of 20 per cent on commissions paid to car dealers who sell their add-on insurance products.

'The ACCC is denying authorisation because we believe this proposal is unlikely to change sales incentives or the quality of products, and consumers will still be sold products without being given adequate information or opportunity to make a considered decision,' ACCC Chairman Rod Sims said.

'While insurers would benefit from a cap at the expense of car dealers, this conduct is likely to lessen competition between insurers, including by creating greater opportunities for explicit or tacit collusion and greater shared knowledge between insurers of competitors' costs.'

'The ACCC is also concerned that these arrangements, if implemented, could significantly delay the development of more effective solutions to the problems that ASIC has identified,' Mr Sims said.

The 17 February 2017 and 9 March 2017 media releases can be found here:

<https://www.accc.gov.au/media-release/accc-proposes-to-deny-authorisation-for-insurance-companies-to-jointly-set-a-cap-on-sales-commissions>.

3.3 Parallel imports - amendments to the Motor Vehicle Standards Act (Cth)

On 10 February 2016, the Federal Government announced that it would amend the Motor Vehicle Standards Act (Cth) to reduce existing restrictions on the parallel import of new motor vehicles. For further information on the effect of the amendments on new and new used vehicles, please see our previous issue of the AutoRegulatory Update December 2016 (insert link)

The Government is yet to release details of the amendments to the Motor Vehicle Standards Act (Cth) and the Government has stated that the details of the amendments will be refined through further consultation with stakeholders.

Legislation is currently being drafted for introduction into Parliament. The Government's planned reforms to the Motor Vehicles Standards Act (Cth) are expected to be introduced in 2018. The reforms will commence 12 months after the passage of legislation, with a transition period to enable businesses to adapt to new arrangements. The personal new vehicle imports scheme will commence in 2018.

For more information of the reform of the Motor Vehicle Standards Act (Cth), please visit the following website: https://infrastructure.gov.au/vehicles/mv_standards_act/

3.4 Australian Consumer Law Review recommends significant changes

The review of the Australian Consumer Law (ACL Review) commenced on 31 March 2016 with the release of an Issues Paper by Consumer Affairs Australia and New Zealand (CAANZ) for public comment. The Issues Paper discusses a range of issues including a need to reform the ACL's scope, enhancing the effectiveness of consumer guarantees, product safety, unconscionable conduct and unfair trading, unfair contract terms and unsolicited consumer agreement, implementation, administration, enforcement, online purchasing and also technical amendments.

An Interim Report collated a range of stakeholder submissions on the Issues Paper who mostly regarded the ACL as a positive development as it provided a consistent set of rights and responsibilities applicable nationally and across industries, as well as helping to reduce regulatory complexity. However some stakeholders felt certain areas of the ACL needed to be clarified or strengthened to achieve its purpose.

CAANZ has published its final report on its review of ACL Review.

The ACL Review makes a significant number of proposals for reform which would, if implemented, have a potentially large impact on retail new motor vehicle dealers. They include:

- Amending the consumer guarantees to specify that where a good fails to meet a guarantee within a short, specified period of time, a consumer be entitled to a refund or replacement without needing to prove a 'major failure' (for example, similar legislation in the United Kingdom specifies a 30 day refund entitlement where goods fail to meet certain standards);

- Clarifying that multiple minor failures can now accumulate to amount to a major failure (whether or not those minor failures relate to the same or different issues);
- Imposing additional requirements relating to extended warranties - including additional disclosure requirements such as a comparison to ACL rights and a ten day cooling-off period (which becomes an unlimited cooling off period if the disclosure obligations are not met);
- Adding additional guidance for what 'reasonable durability' and 'unsafe' means in the context of consumer guarantees;
- Expanding consumer guarantees so that they apply to all online auction sales;
- Requiring any additional fees and charges to be included in the headline price for online sales;
- Reducing the evidentiary burden on consumers to prove claims for breaches of the consumer guarantees;
- Increasing maximum financial penalties for breaches of the ACL; and
- Extending the ACL prohibitions on unconscionable conduct to apply to publicly listed companies.

According to the ACL Review Report, its proposals outline a reform package for the consumer affairs ministers of the Commonwealth, States and Territories to consider and implement. Consumer affairs ministers will meet in late 2017 to decide on what proposed reforms are recommended to the *Council of Australian Governments Legislative and Governance Forum on Consumer Affairs (CAF)*. Once CAF has then agreed to the recommended reforms, they will be put to Parliament as a reform package for implementation. No estimated time frame has been given for this to occur.

The Issues Paper can be found here - <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/issues-paper/>

The Interim Report can be found here - <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/have-your-say/interim-report/>

The Final report can be found here-
https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf

3.5 Productivity Commission delivers enforcement & reform report as part of Australian Consumer Law review

On 12 April 2017, the Productivity Commission released a report to the Federal Government which evaluates the enforcement and administration of the *Australian Consumer Law*, and the role regulators play in making the law accessible and effective for consumers. In its report, the Productivity Commission makes specific recommendations about reform which may impact upon motor vehicle dealers.

In particular, the Commission recommends that Government consider expanding the powers of regulators to compel businesses (including motor vehicle dealers) to participate in alternative dispute resolution, such as mediation (without the need for legal proceedings to be on foot). The ability to actually compel (not just encourage) businesses to participate in alternative dispute resolution

processes, without there being a legal proceeding on foot, would represent a significant shift from the current regulatory and enforcement environment.

Among other issues cited in its report, the Productivity Commission considered that:

- Maximum financial penalties available under the ACL are too small;
- Government should consider expanding all ACL regulators' powers to issue infringement notices to deal with range of minor offences in a cost-effective manner;
- Government should consider implementing a public register of consumer complaints (subject to appropriate vetting);
- Government should consider streamlining the differences in administration and enforcement of the Australian Consumer Law between the various State jurisdictions. A specific example of an issue in this area was the different State jurisdictional limits, which prevented consumers in certain States from commencing low cost legal proceedings in relation to motor vehicles; and
- There should be additional Government funding for consumer advocacy groups.

In preparing its report, the Productivity Commission considered submissions from a range of consumer organisations, industry participants and stakeholders and some State law societies. The submissions included calls for industry specific retail ombudsmen to assist consumers to resolve disputes under the ACL. While the Productivity Commission has not made any recommendation for the appointment of an industry specific ombudsman for the new motor vehicle retail industry, it has recommended that the Government consider expanding the powers of the ACL regulators where there is no industry specific ombudsman (such as in the retail new motor vehicle industry).

The Productivity Commission's report is part of the broader review of the *Australian Consumer Law* which we have reported on above.

3.6 Competition Policy Review

The Competition and Consumer Amendment (Competition Policy Review) Bill 2017 which amends the Competition and Consumer Act 2010 was introduced to Federal Parliament on 30 March 2017. In a related development based on the Harper Review of competition law, the Competition and Consumer Amendment (Misuse of Market Power) Bill 2017 passed the House of Representatives on 28 March 2017 and it was introduced into the Senate the following day.

These two Bills have been discussed in detail above in 1.1.

3.7 Review of the Australian Small Business and Family Enterprise Ombudsman

On 15 March 2017, the Minister for Small Business the Hon Michael McCormack announced a review into the operation of the Australian Small Business and Family Enterprise Ombudsman. The Review is being led by independent expert Su McCluskey with the support of a Secretariat provided by Nous Group.

The Government established the Small Business and Family Ombudsman to extend the activities of the Australian Small Business Commissioner to create a centralised position that can give small business the advice they need and help Government policy makers understand the needs of small business.

Kate Carnell commenced as Australia's first Ombudsman on 11 March 2016 .

The Ombudsman's functions and powers are set out in the Australian Small Business and Family Enterprise Ombudsman Act 2015 (the Act).

Under the Act, the Ombudsman has an advocacy function and an assistance function:

Under the Advocacy Function the Ombudsman can undertake research and enquiries into legislation, policies (initiated by the Ombudsman or the Minister, contribute to the development of national strategies, and promote best practice in dealing with small businesses and family enterprises.

The Ombudsman's assistance function involves responding to requests for assistance in relation to small business and family enterprise matters, including referring requests to responsible agencies and working cooperatively with relevant agencies

The Review is to examine how efficiently and effectively the Ombudsman has undertaken the assistance and advocacy functions and to make recommendations for any improvements to these functions.

Under the Act, the assistance function must be reviewed and a report provided to the Minister for Small Business no later than 30 June 2017.

Submissions close 5pm 12 April 2017 and the review will provide a final report of findings to the Government on 30 June 2017.

<http://treasury.gov.au/ConsultationsandReviews/Reviews/2017/Review-of-the-Australian-Small-Business-and-Family-Enterprise-Ombudsman/Consultation>

3.8 ASIC takes action against car yard loan-writer

Adam Edward Greene, who wrote and submitted loans for customers buying vehicles from Combined Motor Traders, a Cranbourne used-car dealership, between 2014-2015 has been permanently banned by ASIC from engaging in credit activities.

ASIC found that four loans submitted by Mr Green approved by Esanda, a division of ANZ, contained false information and two of those loans contained false documents that were not supplied to him by the applicants. The use of false information to obtain loans for consumers is illegal.

ASIC stated that Lenders should carefully assess the way they manage approval of loans, including the way in which car yard employees provide assistance to consumers to obtain finance. Changes should be made if the commission structure encourage illegal practices.

Relevance to Dealers

This banning reinforces the strong message that ASIC will not hesitate to take enforcement action against individuals who engage in illegal conduct when engaging in credit activities.

3.9 ACCC Small business in focus report

On 25 January 2017, the ACCC released its half-yearly *Small business in focus* report (half year report no. 13) which contains updates relating to small business and franchising complaints data and highlights the ACCC's work in the small business sector from 1 July to 31 December 2016. Some of the key findings of the report include:

- Nearly 7,000 people contacted the ACCC between 1 July and 31 December 2016 with a small business or franchising or agriculture related complaint or enquiry.
- There have been 6,700 views of the ACCC's small business videos.
- The ACCC commenced proceedings in the Federal Court against:
 - Morild Pty Ltd, the current franchisor of the Pastacup restaurant franchise system and its former director Mr Stuart Bernstein. The ACCC allege the franchisor breached the Franchising Code by failing to disclose Mr Bernstein's role as director of two previous franchisors of the Pastacup system that became insolvent. This is the first ACCC litigation under the new Franchising Code and the ACCC is seeking penalties from the Court.
 - ABG Pages Pty Ltd and another individual associated with the company. The ACCC alleges ABG Pages breached the Australian Consumer Law in its dealings with small businesses, who were actual or potential customers of its online business directory service.

Relevance to dealers

Motor vehicle dealers should be aware that breaches of the Franchising Code, unconscionable conduct and misleading and deceptive continue to be key areas of focus for the ACCC. Importantly, dealers should ensure that their advertisements and other representations made to consumers do not contain misleading and deceptive statements in contravention of the Australian Consumer Law.

The *Small business in focus* report released by the ACCC is available here:

[http://www.accc.gov.au/system/files/Small business in focus issue 12 July 2016.pdf](http://www.accc.gov.au/system/files/Small%20business%20in%20focus%20issue%2012%20July%202016.pdf)

https://www.accc.gov.au/system/files/1150_Small%20business%20in%20focus%20%2313_FA.PDF

3.10 ACCCount - 1 October 2016 to 31 March 2017

The ACCC has released two recent editions of its report named '*ACCCount: A report of the Australian Competition and Consumer Commission's activities*', being for the periods of 1 October to 31 December 2016 and 1 January to 31 March 2017.

The key highlights for the December 2016 quarter include:

- The ACCC was involved in 17 litigated proceedings relating to competition enforcement in a range of industries including shipping, pharmaceuticals, constructions, travel, and financial services. Of the 17 proceedings litigated:
 - 14 were carried over from the previous quarter;

- 3 were commenced in this quarter;
 - 2 were concluded against Flight Centre Travel Group and ANZ and Macquarie Bank Limited in which judgment was delivered in favour of the ACCC; and
 - 15 remained ongoing at the end of the quarter.
- In the December quarter there were six 87B undertakings accepted relating to consumer protection
 - On 13 December 2016, the ACCC hosted a new car retailing industry invited stakeholder forum in Melbourne which was attended by representatives from industry (including manufacturers, dealers, repairers and parts retailers), consumer groups and relevant government departments/agencies.

The key highlights for the March 2017 quarter include:

- On 24 February 2017 the ACCC announced its key enforcement and compliance priorities for 2017 which included unfair contract terms. The ACC will also be looking to broaden the scope of its work in relation to consumer guarantees, in particular looking at the application of consumer guarantees to both complex products and services, such as motor vehicle industries.
- On 9 March 2017 the ACCC issued a determination denying authorisation for 16 insurance companies to agree to a cap of 20% on commissions paid to car dealers who sell their add on insurance products. The insurer's proposal followed a review conducted by the Australian Securities Investments Commission (ASIC) which found that the market for add on insurance products was failing consumers. The ACCC was not satisfied that the Applicant's proposal would result in any significant benefit, and was unlikely to redress the issues identified by ASIC.
- In March 2017 the ACCC instituted proceedings in the Federal Court against German company Audi Aktiengesellschaft (Audi AG), its Australian subsidiary Audi Australian Pty Ltd (Audi Australia) and their owner, German Company Volkswagen Aktiengesellschaft (VWAG). The ACCC alleges that Audi AG and Audi Australia made false or misleading representations and engaged in misleading or deceptive conduct, in relation to certain diesel vehicle emission claims. The ACCC also alleges that VWAG was knowingly concerned in this conduct.
- In 2017 the ACCC's Compliance and Enforcement priorities for consumer protection included:
 - consumer issues in new car retailing, including responses by retailers and manufacturers to consumer guarantee claims
 - ensuring businesses receive the protections of industry codes of conduct including the Franchising Code and the new unfair contract terms law.
- The ACCC continued to engage with key stakeholders to collect and discuss matters relevant to the new car retailing industry market study. This has included attending workshop site visits and gathering additional information from key stakeholders to inform analysis for the study.
- During the March quarter it is indicated that the ACCC received 1,347 reports and inquiries about trader conduct in the Car Retailing industry.

Relevance to dealers

The ACCC has continued to achieve successful enforcement outcomes in 2016. With the ACCC now turning its attention to small business contract terms, automotive dealers must ensure that they remain compliant with the recent legislative changes.

The ACCCount Reports are available here:

<https://www.accc.gov.au/system/files/EO%20-%20ACCCCount%20-%20FINAL%20-%20December%202016%20Quarter%20%282%29.pdf>

<https://www.accc.gov.au/publications/acccount/acccount-1-january-to-31-march-2017>

3.11 Australia Bureau of Statistics - Sales of New Motor Vehicles, Australia, January 2017

The Australian Bureau of Statistics has published *Sales of New Motor Vehicles, Australia, January 2017* which presents details for the sales of new motor vehicles for September 2016.

September trend estimates - key points

- The January 2017 trend estimate (97,231) decreased by 0.2% when compared with December 2016
- When comparing national trend estimates for January 2017 with December 2016, sales for Sports utility and Other vehicles decreased by 0.7% and 0.4% respectively. By contrast, sales for Passenger vehicles decreased by 0.4%
- The largest downward movement across all states and territories, on a trend basis, was in Tasmania (-1.8%)
- The largest downward movement across all states and territories, on a trend basis, was in the Australian Capital Territory (1.0%). Continuing an upward trend which commenced on September 2016 .

3.12 National Transport Commission Reviews introduction of automated road and rail vehicles

The National Transport Commission (**NTC**) has commenced a review into the existing regulatory framework in Australia which may apply to the introduction of automated road and rail vehicles.

The NTC is an independent statutory body established to develop and submit law reform recommendations to a council of federal and state transport, infrastructure and planning ministers known as the Transport and Infrastructure Council.

The objective of the NTC's review is to identify any existing laws or regulations rules which are unnecessary, in need of reform or operate as barriers to the safe introduction of automated road vehicles.

Automated vehicles are defined in the review as vehicles that have some level of system automation and which do not require a human driver for some (or all) of the task of driving.

The context for the review is what the NTC regards as the disruptive impact of increasing but diverging manufacturing trends toward automated driving controls, in circumstances where Australian road rules assume that drivers are human and use their own judgement, not automated technology, to drive their road vehicles

In May 2016, the NTC release a discussion paper -'Regulatory options for automated vehicles' which examined the legislative barrier to increasing vehicle automation and proposed potential options to address these barriers. The NTC received 51 submissions in response to the discussion paper. The discussion paper proposed that in the short term, national guidelines for trials of automated vehicles which was strongly supported by Government and industry stakeholders.

In November 2016, the NTC released a policy paper, Regulatory Reforms for automated road vehicles. The policy paper sets out key policy findings and eight recommendations to address these issues, including that the NTC and Austroads develop national guidelines for on road field testing and trials of automated vehicles in Australia, and that the NTC develops legislative reform options to clarify the application of current driver and driving laws to automated vehicles and to establish legal obligations for automated driving system entities.

Transport ministers approved all eight recommendations outlined in the policy paper and charged NTC with delivering recommended regulatory reform agenda.

On 22 November 2016, the NTC released a discussion paper seeking feedback from manufacturers, technology providers, industry groups and road user on the development of national guidelines for automated vehicle trials.

The paper:

- Proposes key criteria for inclusion in the guidelines
- Identifies key issues for supporting trials based on other Australia and international frameworks
- The NTC called for submissions on the discussion paper by Monday, 16 January 2017.

Based on the feedback received in submissions, the NTC will develop draft guidelines for ministers to consider at the May 2017 Transport and Infrastructure Council meeting. If ministers endorse those guidelines, the next step will be for all levels of government to adopt and enact them.

A copy of the discussion paper is available here: <http://ntc.gov.au/about-ntc/news/media-releases/a-step-closer-to-national-automated-vehicle-trials/>

3.13 National Transport Commission calls for submissions on safety assurance for Automated Vehicles

The National Transport Commission (NTC) has called for submissions by 28 July 2017 on options being considered for laws to assure automated vehicle safety.

These options are set out in a discussion paper recently released by the NTC. In the paper, the NTC evaluates 3 alternatives for changing the current regulatory framework for motor vehicles and driver certification and asks a series of consultation questions about each option. The 3 options outlined in the NTC discussion paper are, in summary:

- **Self-Certification** - Introducing compliance guidelines and obliging manufacturers and suppliers to submit a statement of compliance for each vehicle. Primary duty for manufacturers, suppliers and automated driving system entities to provide safe automated vehicles. An automated vehicle would be free to operate on any road network once a statement of compliance was submitted and approved. Technical compliance managed internally by vehicle manufacturers and no reporting of system failures to government.
- **Pre-market approval** - Establishing a Government agency responsible for approving applications to permit automated driving to operate on public roads. System of pre-approval would also extend to any safety-critical changes to the vehicles. Evidence of vehicle design and testing to assist the approval process. Pre-approval process to run parallel to ADR approvals. Ongoing reporting of 'safety-critical events' expected. Approvals system could be handled by third party experts.
- **Accreditation** - Adopt an accreditation system to apply to operators responsible for automated driving systems. The accreditation agency assesses whether the applicant has identified and managed risks to a legal standard of care but does not approve the operators' vehicles or take responsibility for their safe operation. Accreditation would allow registration of any automated vehicle or automation system manufactured by the applicant, subject to also meeting relevant ADR approvals/exemptions.

The NTC's planning of the regulation and operation of Australian road, rail and other transport now includes automated vehicle technology. Among the NTC's current projects, it is planning a 'safety assurance system' to plan for the commercial deployment of vehicles with different levels of automation. This 'safety assurance system' will be implemented alongside separate driver reforms.

Having regard to submissions to the NTC in response to the consultation questions in the discussion paper, the NTC will select a 'preferred regulatory option' and report to the Transport and Infrastructure Council in November 2017. A policy paper will then be released for further consultation on how to implement the preferred regulatory option.

4 Case law update

4.1 Breaching Consumer Credit Laws

[Australian Securities and Investments Commission v Channic Pty Ltd \(No 4\) \[2016\] FCA 1174](#)

Background

Channic Pty Ltd, a Cairns-based lender, and Cash Brokers Pty Ltd, a broker, operated from Supercheap, a used car dealership. The dealership was owned by Colin William Hulbert who was also the sole director of both Channic and Cash Brokers. Cash Brokers allegedly assisted vulnerable indigenous consumers to obtain loans from Channic at 48% interest, while also charging brokerage fees financed under the loans. Channic did not assess whether the loans were suited to the consumers' requirements. ASIC brought civil penalty proceedings after the Indigenous Consumer Assistance Network reported that Channic and Cash Brokers were dealing unjustly with consumers from the remote community of Yarrabah.

Outcome

Channic, Cash Brokers and Hulbert were fined \$776,000 for breaching consumer credit laws including a \$220,000 penalty on Hulbert himself. The court also awarded a total of \$47,699 in compensation to affected consumers.

Relevance to dealers

Dealers must be aware of the responsible lending provisions contained in the National Consumer Credit Protection Act and be wary of conduct that could otherwise amount to unconscionable conduct or unjust transactions. ASIC Deputy Chairman Peter Kell commented, 'The penalty awarded by the Federal Court is not just condemnation of this misconduct, but is a warning to other lenders who might consider pursuing profits at the expense of their obligations to consumers'.

4.2 Guarantees as to acceptable quality

[Golding v Salloum \[2016\] NSWCATAP 267](#)

Background

This appeal matter concerned a major failure to comply with consumer guarantees and motor dealer guarantees in relation to the sale of a defective vehicle.

On 4 December 2015, Georges Salloum, the respondent, purchased a used motor vehicle from the appellant, Charles Golding. The vehicle was purchased from the appellant's motor vehicle dealership, Golden Motors, and was priced at \$14,000-\$15,000. The Respondent traded in his own vehicle and paid \$5000. Apart from a signed transfer of registration and the tax invoice, no other document pertaining to the transaction was provided to the respondent. On 18 January 2016, the engine failed. The vehicle was inspected, and it was found that there was damage to the front chassis and left-hand lower control arm of the vehicle, as well as water and rust in the fuel system. Mr Salloum commenced proceedings in the Consumer and Commercial Division of the Civil and Administrative Tribunal on 20 April 2016, seeking a refund of the purchase price.

Outcome

In May 2016, the Tribunal concluded that the vehicle was 'not of acceptable quality at the time of sale' in breach of the consumer guarantee expressed in section 54 of the Australian Consumer Law (**ACL**), and therefore was defective for the purpose of section 68 of the *Motor Dealers and Repairers Act 2013* (NSW) (**MDR Act**). The tribunal determined that a reasonable consumer, aware of the defects in the vehicle at the time of sale, would not have acquired that vehicle.

Charles Golding, the appellant, appealed a decision from the Civil and Administrative Tribunal, in which he was ordered to pay the respondent, Georges Salloum, \$14,000 as a full refund of the purchase price of the vehicle. On appeal, the legal obligation upon the appellant to refund the purchase price was not challenged; the challenge was confined to the quantum of the refund. The Tribunal dismissed the appeal.

Relevance to dealers

Used vehicle dealers should be aware of the consumer guarantees and protections contained in both the Australian Consumer Law, and the MDR Act when selling a vehicle. Suppliers may be required to repair the damage, replace the car, or provide a full refund. This case highlights the importance of keeping appropriate and accurate records concerning the quality of the vehicle upon sale, and the details of transactions.

Campbell v Caravan & RV Central Pty Ltd t/as Avan New South Wales & FCA Australia Pty Ltd [2016] NSWCATCD 90

Background

This case concerns a major failure to comply with the guarantee as to acceptable quality in relation to the sale of a defective motorhome vehicle.

The Applicant, Frederick Campbell, brought proceedings in the Consumer and Commercial Division of the Civil and Administrative Tribunal against Caravan and RV Central Pty Ltd trading as Avan New South Wales (First Respondent) in November 2015. FCA Australia Pty Ltd (Second Respondent) was joined to proceedings in December 2015.

In early 2013, the Applicant purchased a motorhome from the First Respondent for \$109,000. The First Respondent was the manufacturer of the body of the motorhome, and the Second Respondent was the manufacturer of the chassis and its passenger cabin. Immediately following purchase, defects appeared in the motor home, and persisted over a period of about two and a half years, after several repairs. At around late August or early September 2015, the Applicant contacted the First Respondent to reject the motorhome, and requested a refund of the purchase price. The First Respondent refused to accept the return or refund.

Outcome

The tribunal found that the motorhome was not of acceptable quality within the meaning of section 54(3) of the Australian Consumer Law (**ACL**), and as a result, the First and Second Respondents failed to comply with the guarantee as to acceptable quality when they supplied the motorhome to the Applicant. The tribunal also found that the failure to comply with this guarantee was a major failure of compliance within the meaning of section 260 of the ACL, and as a result, the Applicant was entitled to reject the motorhome and receive a refund.

Relevance to Dealers

Dealers should be aware that carrying out repairs to vehicles under warranty does not discharge them from the consumer guarantee as to acceptable quality. Goods must be of acceptable quality at the time of supply/purchase, and any relevant repairs made by a supplier do not demonstrate compliance with the guarantee at the time of supply.

Matumaini v Automobile Industries Pty Ltd [2017] NSWCATAP 93

Background

This appeal concerned a failure to comply with consumer guarantees and motor dealer guarantees in relation to a sale of a defective vehicle due to a lack of acceptable quality.

On 23 October 2013, Mike Matumaini, the appellant, purchased a used Kia Carnival wagon from Automobile Industries Pty Ltd, the respondent. The vehicle was purchased from the respondent's used car dealership under the name of Sydneywide Wholesale Cars, priced at \$7,640 excluding a \$1,000 commission and a warranty payment of \$1,995. When the appellant went to collect the vehicle from the respondent, he was told that 'we have done the service for you, we have checked the engine, changed the water and the oil'.

On 17 December 2013, the vehicle broke down for the first time. He spoke with the respondent and was not offered a refund or told there was anything else that he could do in this situation except get the vehicle repaired. The appellant had to organise for the vehicle to be towed to a repairer. The repairer found at least 2 cylinders with a zero compression and upon further inspection, evidence of a cracked piston and scouring of the cylinder bore was found as well as significant wear and damage to the valves.

On or around the beginning of April 2014, the vehicle broke down for a second time approximately 12 weeks after it was first repaired. The appellant took the car back to the original repairer who suspected a possible cracked head or blown head gasket between two cylinders and water jackets and recommended that the motor be replaced.

On 18 March 2015, the appellant commenced proceedings in the Consumer and Commercial Division of the Civil and Administrative Tribunal, seeking an order that the respondent pay to him an amount of \$9,995.57.

Outcome

On appeal, the Tribunal concluded that the vehicle was not of acceptable quality because it did not satisfy the requirements of Sections 54(2)(a),(c) and (e) of the *Australian Consumer Law (ACL)*, namely being fit for all the purposes for which goods of that kind are commonly supplied, free from defects and durable. The Tribunal based this conclusion of the facts that the vehicle was purchased for \$7,640 and after less than 8 weeks use, the engine stopped working and a replacement was required at the cost of \$4,537.13. The Tribunal further concluded that the failure to comply with the consumer guarantee of acceptable quality was a major failure, in that the vehicle would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure as per Section 260 of the ACL.

Relevance to dealers

Used car dealers should be aware of the consumer guarantees and protections contained in the Australian Consumer Law when selling a vehicle. Suppliers may be required to repair the damage, replace the car, or provide a full refund for major failures to comply with these guarantees.

4.3 Interpretation of Contracts and Misleading Conduct

Kumar Motors (Bankstown) Pty Ltd vs Insurance Australia Ltd (t/as NRMA Insurance) [2016] NSWSC 1874

Background

In June 2006, Motor dealership Kumar Motors (Bankstown) Pty Ltd (the plaintiff) entered into an 'Agency Agreement' with Insurance Australia Ltd trading as NRMA Insurance (the defendant). Under the agreement, the plaintiff was entitled to be paid a commission when it caused a Compulsory Third Party (CTP) policy to be issued by NRMA, as well as each time any such policy was renewed. The defendant terminated the agreement on 15 May 2014. The plaintiff claimed that it had a right to ongoing renewal commission for CTP policies written during the life of the agreement but renewed after its termination. The plaintiff claimed that it entered the agreement on the basis of representations made by the defendant concerning the circumstances in which the plaintiff would be entitled to renewal commissions following termination of the agreement. The plaintiff claimed that those representations constituted misleading or deceptive conduct for the purposes of section 18 of the Australian Consumer Law (ACL).

Outcome

The agreement did not say that the defendant's obligation to pay the plaintiff a renewal commission on a CTP policy introduced during the life of the agreement would endure beyond termination of the agreement. The court determined that objectively, the relevant clause of the agreement did not entitle Kumar Motors to renewal commissions beyond termination of the agreement.

The court then considered the representations made by the defendant. It was found that in neither of the representations was it expressly stated that renewal commissions would be paid beyond termination of the agreement. The court also found that the plaintiff had not entered into the agreement in reliance on the representations, and even if it did, there was no evidence that it suffered any detriment as a result. The plaintiff's case on alleged misleading or deceptive conduct failed.

Relevance to Dealers

If entering into an agreement with an insurance company in which commissions are paid in return for the issuing of policies, dealers should be aware of what the practical, commercial consequences of the agreement is, what happens on termination, and how this could effect the dealer's responsibility to its customers. Dealers should also be aware of any representations made at the time of entering into the agreement.

4.4 Dealer Sales Targets in franchise agreements

Background

This recent decision by the New York Court of Appeal concerned a claim brought by a motor dealer (the appellant) against General Motors LLC (**GM**). The appellant claimed that GM's reliance on a Retail Sales Index (**RSI**) was unreasonable and unfair because it failed to account for local customer preferences and low brand popularity for Chevrolet vehicles in the area. Section 463 of the New York Vehicle and Traffic Law (**Dealer Act**) makes it unlawful for a franchisor to use an unreasonable, arbitrary or unfair sales or performance standard in determining a dealer's compliance with a franchise agreement.

Decision

The court found that a performance standard that requires 'average' performance based on state-wide sales data in order for a car dealer to retain its dealership unreasonable, arbitrary or unfair under the Dealer Act. This is because it does not account for local variations. The court recognised that there is a great disparity between the motor vehicle manufacturer and the dealer, which creates an undue imbalance in bargaining power.

Relevance to Dealers

This case is relevant in an Australian context as dealer sales targets, or standards based on area of responsibility or prime market areas are contained in a large number of Australian dealer agreements. Part 6 of the Motor Dealers and Repairers Act (**MDR Act**) provides statutory protection to dealers against motor vehicle distributor which impose unfair contracts. It is likely that dealer agreements which fail to represent market place realities or challenges and which are set in an arbitrary manner are likely to be in breach of Part 6 of the MDR Act and therefore void.

4.5 ACCC planning court action against Audi in emission claims scandal

The ACCC has instituted proceedings in the Federal Court over alleged deceptive vehicle emission claims made by Audi Australia. Similar proceedings were brought against Audi's parent company, Volkswagen, in September 2016. More than 12,000 affected cars are on Australian roads which were allegedly claimed by Audi as environmentally friendly and compliant whilst they were actually fitted with software to cheat emissions tests. The ACCC alleges that between 2011 and 2015, Audi engaged in misleading conduct by not disclosing the use of 'defeat' software so that vehicle in lab conditions produced less nitrogen oxide. Volkswagen is also named in the proceedings as it is alleged to have known about Audi's conduct. Audi Australia is currently reviewing the claims made by the ACCC and defending class action proceedings brought by private plaintiffs.

4.6 Yazaki Corporation Ordered to Pay Millions in Penalties for Collusive Conduct

On 10 May 2017 the Federal Court ordered Yazaki Corporation (**Yazaki**), one of the world's largest makers of automotive electronics and wiring harnesses, to pay \$9.5 million in penalties for engaging in collusive conduct with a competitor in the supply of wiring harnesses to Toyota Motor Corporation (**Toyota**). Yazaki is the parent company of Australian Arrows Pty Ltd.

In November 2015, the Federal Court found that Yazaki had engaged in collusion including the coordination of quotes to Toyota in Australia between 2003 and 2008. The case against Yazaki was brought by the Australian Competition and Consumer Commission (ACCC). Justice Besanko of the Federal Court held the conduct to be 'deliberate, sophisticated and devious' and including 'the manipulation of prices and components of prices so as to avoid arousing suspicion'.

Even though Yazaki's unlawful conduct took place in Japan, the Court found Yazaki to be subject to Australian law on the basis that it was carrying on a business in Australia at the relevant times.

Yazaki was also ordered to pay 85% of the ACCC's costs of the Federal Court proceedings.

On 30 May 2017, the ACCC announced that it has appealed the Federal Court of Australia's decision to fine Yazaki Corporation \$9.5 million for collusive conduct. The ACCC's appeal is to increase the amount of the fine significantly.

ACCC Chairman Rod Sims stated that in the ACCC's view, Yazaki should be fined between \$42 and \$55 million for its collusive conduct. According to the ACCC, increasing the penalties by five to six times the original decision would be justified having regard to 'the size of Yazaki's operations and the very serious nature of its collusive conduct', as well as the need for the penalties to serve as a strong deterrent to companies from breaking Australia's competition laws.

The ACCC's appeal will be heard on a date to be fixed by the Full Federal Court.

4.7 Prohibition of Good Faith and Unconscionable Conduct in Franchise Agreement

Background

This matter is currently before the Supreme Court of Victoria involving three Nando's franchisees ('the Franchisees'). Nando's Australia Pty Ltd ('the Franchisor') required the Franchisees to refurbish the Franchisees' restaurant premises.

The Franchise Agreements between the Franchisees and the Franchisor were due to expire or were continuing. The Franchisees refused because the refurbishments were too expensive and had not been negotiated with the Franchisees prior to being enforced. On the basis of their refusal, the Franchisor terminated the Franchise Agreements.

The Franchisees are seeking damages, injunctions and declarations of invalidity of the termination, alleging that the Franchisor breached the Franchise Agreements by engaging in unconscionable conduct and breaching the implied duty of good faith.

'Pizza Hut decision'

This case resembles the decision of *Diab Pty Ltd v YUM! Restaurants Australia Pty Ltd*, known as the Pizza Hut decision, in which the franchisees contended that the imposition of a new pricing regime resulted in the franchisor's breach of the alleged implied obligation to 'guarantee' that the franchisees make a profit. The franchisees further claimed that the franchisor acted unconscionably and in bad faith.

The Federal Court found that the franchise agreement did contain an implied term that required the franchisor to set prices that were profitable for franchisees. In relation to the good faith obligation, the

Court held that the franchisor did not breach this duty as its decision was made by balancing all evidence at its disposal and the duty of good faith does not require that a party subrogate its own interests to those of a counterpart. Finally, it was held that the conduct was not unconscionable as unconscionable conduct requires more than mere unreasonableness and must extend into the realm of serious dishonesty and intentional exploitation.

An appeal to the Federal Court was lodged by the franchisees and the hearing commenced on 15 May 2017.

Relevance to Dealers

Under the Franchising Code of Conduct, parties who enter into franchise Agreement must act in good faith towards one another and must not act unconscionably. This case will provide further commentary in this area and help to define the obligations on parties and their impact on franchise agreements.

We will continue to watch this case as well as the appeal to the Federal Court in relation to the Pizza Hut decision and provide further updates as the matter progresses.

5 Our National Automotive Team

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